

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Power Company d/b/a	:	
AmerenIP and Ameren Illinois	:	
Transmission Company	:	08-0291
	:	
Petition for an Order pursuant to	:	
Section 8-509 of the Public Utilities	:	
Act Approving Petitioners' Use of	:	(Consolidated)
Eminent Domain Power.	:	
	:	
Illinois Power Company d/b/a	:	
AmerenIP and Ameren Illinois	:	
Transmission Company	:	08-0449
	:	
Petition for an Order pursuant to	:	
Section 8-509 of the Public Utilities	:	
Act Approving Petitioners' Use of	:	
Eminent Domain Power.	:	

PROPOSED ORDER

I. PROCEDURAL HISTORY

In these consolidated proceedings, Illinois Power Company, d/b/a AmerenIP ("Ameren," or the "Company") and Ameren Illinois Transmission Company ("AITC") (jointly, "Petitioners"), filed the above-referenced Petitions with the Illinois Commerce Commission ("Commission"). Petitioners therein seek an Order pursuant to Section 8-509 of the Illinois Public Utilities Act (the "Act"), 220 ILCS 5/8-509, approving the use of eminent domain to acquire rights-of-way across certain parcels of land on Commission-approved routes for new 345 kilovolt ("kV") electric transmission lines authorized in Docket 06-0179.

The subject of the first docket, 08-0291, is the "Prairie West Line." The subject of the second docket, 08-0449, is the "Baldwin Rush Line."

Pursuant to due notice, hearings were held before a duly authorized Administrative Law Judge at the Commission's Springfield offices. Appearances on behalf of parties were entered by respective counsel for Petitioners, Intervenor Dynegy Midwest Generation, Inc. ("DMG" or "Dynegy"), and the Illinois Commerce Commission Staff ("Staff"). At the hearing, Rick D. Trelz, Tracy J. Dencker, and Christopher C. Pflaum testified on behalf of Petitioners. Daniel E. Roethemeyer testified on behalf of Dynegy. Ronald Linkenback, a Senior Electrical Engineer in the Engineering Department of the Energy Division, testified on behalf of Staff. A petition for leave to

intervene was filed in Docket 08-0449 on behalf of certain landowners, Diana Robinson, et al.; they appeared at the initial hearing through their attorney.

At the conclusion of the hearings, the case was marked "Heard and Taken." Thereafter, initial and reply briefs were filed on behalf of Petitioners and Staff. An initial brief was filed by Dynegy. A proposed order was served on the parties.

II. BACKGROUND – DOCKET 06-0179

The Commission entered an Order in Docket 06-0179 on May 16, 2007, granting a Certificate of Public Convenience and Necessity to AmerenIP and Ameren Illinois Transmission Company pursuant to Section 8-406 of the Public Utilities Act. The Certificate authorized the construction and operation of three 345 kV electric transmission lines, totaling approximately 38 miles in length, over the routes approved therein. There were numerous intervenors in the case, many of whom were landowners over whose property the transmission lines would extend.

The lines will be used to interconnect Ameren's high voltage transmission system with a 1,650 megawatt coal-fired generating station, known as the Prairie State Facility, being constructed near Marissa in Washington County.

Petitioners also requested that the Commission "authorize construction of the Project pursuant to Section 8-503 of the Act." Section 8-503 provides, in part:

Whenever the Commission ... shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility ... are necessary and ought reasonably to be made or that a new structure or structures is or are necessary and should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the Commission shall make and serve an order authorizing or directing that such additions, extensions, repairs, improvements or changes be made, or such structure or structures be erected....

In the findings and ordering paragraphs, the Order in 06-0179 authorized Petitioners "to construct the Project pursuant to Section 8-503 of the Act."

In Docket 06-0179, Staff recommended that the order also grant eminent domain-related relief pursuant to Section 8-503, by specifically finding that the order "will in effect authorize Petitioners to enter upon, take, or damage private property, in the manner provided for by the law of eminent domain" (06-0179, Exc. at 9) However, Petitioners opposed such a finding, observing that it would be premature. They noted that eminent domain authority was not being sought in 06-0179 because negotiations with landowners were ongoing and potentially successful. (06-0179, RBOE at 5-6) Petitioners stated that if they were to subsequently determine there is a need to

condemn certain parcels of property in order to construct the Project, they would seek Commission approval to exercise eminent domain authority in a separate proceeding.

Accordingly, in 06-0179, the Order did not make findings as to whether Petitioners had engaged in diligent, good faith negotiation efforts with landowners or had made reasonable attempts to acquire the necessary land rights through negotiations with landowners. Similarly, the Order did not adopt the finding, proposed by Staff, that the order “will in effect authorize Petitioners to enter upon, take, or damage private property, in the manner provided for by the law of eminent domain” Instead, the Order found that if Petitioners later determined there is a need to seek eminent domain, they will need to obtain Commission authorization before doing so. (Order at 40)

III. INSTANT PROCEEDINGS IN 08-0291 AND 08-0449

These consolidated proceedings involve Petitioners’ request for eminent domain authority, pursuant to Section 8-509 of the Act, with respect to two of the transmission lines authorized in Docket 06-0179: the 7.5 mile transmission line route from the Prairie State Facility west to AmerenIP’s existing Baldwin-Stallings 345 kV line (the “Prairie West Line”) and the 30 mile transmission line route from the Baldwin Power Plant Switchyard west to AmerenUE’s switchyard at the Rush Island Power Plant (the “Baldwin Rush Line”). In Docket 06-0179, the Commission ordered that the Baldwin Rush Line be built on the route shown in Ameren Exhibit 1.1-BR and the Prairie West Line be built on the route shown on Ameren Exhibit 1.1-PW. (Ameren Ex. 1.0-BR (Rev.) at 3)

The Prairie West Line crosses 35 parcels of land. (*Id.* at 4) Petitioners have acquired, by negotiation, easements for 31 parcels of land. (Ameren Exs. 3.0-PW (Rev.) at 5; 4.0-PW (Rev.) at 2-3.) Petitioners are now seeking authority to use eminent domain with respect to the remaining four parcels, owned by two landowners (the “PW Unsigned Parcels”). (Ameren Ex. 4.0-PW (Rev.) at 2-3) The Unsigned Parcels are primarily parcels of agricultural land, ranging from 40 to 80 acres in size. (Ameren Ex. 1.0-PW (Rev.) at 5) Petitioners are seeking rights of way approximately 150 ft. in width across the Unsigned Parcels for the construction of the Prairie West Line, as well as construction easements where necessary. (*Id.*) The target completion date for the Prairie West Line is November 20, 2009.

The Baldwin Rush Line crosses 116 parcels of land. (Ameren Ex. 1.0-BR (Rev.) at 3) Petitioners say they have acquired, by negotiation, easements for most of the parcels of land. (Ameren Ex. 4.0-BR (Rev.) at 2) Petitioners are now seeking authority to use eminent domain authority with respect to the 38 Unsigned Parcels, which are primarily parcels of agricultural and forested land of various sizes. Petitioners are seeking rights of way 150 ft. in width across the Unsigned Parcels for the construction of the Baldwin Rush Line, as well as construction easements where necessary. The target completion date for the Baldwin Rush Line is October 1, 2010.

IV. STATUTORY AUTHORITY - SECTION 8-509 OF THE ACT

Section 8-509 provides in part:

When necessary for the construction of any alterations, additions, extensions or improvements ordered or authorized under Section 8-503 or 12-218 of this Act, any public utility may enter upon, take or damage private property in the manner provided for by the law of eminent domain.

V. POSITIONS OF PARTIES

A. Petitioners' Position

According to Petitioners, to obtain Commission approval to exercise eminent domain authority under Section 8-509, Petitioners must show: (i) that they have received a Section 8-503 order authorizing construction of a project; and (ii) that eminent domain is necessary to complete the authorized construction. This “necessary” showing, Petitioners assert, requires the utility to show that they have negotiated in good faith with the affected property owners to acquire the necessary land rights. (Petitioners Initial Brief at 8)

Even with a Section 8-503 order in hand, Petitioners believe a utility must request and obtain Commission approval authorizing the use of eminent domain authority. (*Id.*, citing Docket No. 06-0179, Order at 40; finding that the requirements for a Section 8-503 order had been met and stating that “[i]f Petitioners later determine there is a need to seek eminent domain, they will need to obtain Commission authorization before doing so”) Petitioners insist that the exercise of eminent domain can not occur until a utility expressly requests and receives Commission approval pursuant to Section 8-509.

Petitioners contend that the question of eminent domain is separate from the inquiry into whether a Certificate should be granted under Section 8-406 of the Act or whether a Section 8-503 order should be granted. They claim the type of evidence required to support a Section 8-406 Certificate is similar to the type of evidence needed to obtain a Section 8-503 order, while the evidence needed to support a grant of eminent domain authority is different.

Petitioners argue that for practical reasons, it may make sense for a utility to seek a Certificate first, and then seek eminent domain later. For example, the utility will not know what route the transmission line will take until a route is approved by the Commission in a Certificate proceeding. Petitioners state that if there are alternative route proposals, as there were in Docket 06-0179, the utility will not know where to seek eminent domain until the route is approved. Thus, Petitioners believe it may make sense to wait to seek eminent domain until a route is identified and negotiations undertaken with landowners, as the eminent domain proceeding will then be more narrowly focused on just the parcels where eminent domain is needed. (Petitioners Initial Brief at 8-9)

According to Petitioners, Staff discounts the distinction between the showing needed for a Certificate or Section 8-503 order and the showing needed to obtain eminent domain authority. Petitioners state that Staff appears to believe that once a Section 8-503 order has been issued, Commission approval of eminent domain authority amounts to nothing more than a Commission rubber stamp that the Section 8-503 order was received. (Petitioners Initial Brief at 10)

Petitioners assert that a utility seeking eminent domain authority must show more than just receipt of a Section 8-503 order. To obtain Commission approval, Petitioners say the utility must show that it has negotiated in good faith with the affected property owners to acquire the necessary land rights. According to Petitioners, the demonstration of good-faith negotiations is distinct from the requirement that the utility show that construction is necessary, which can be satisfied by a Section 8-503 order. (Id.)

According to Petitioners, in addition to showing that “alterations, additions, extensions or improvements” have been authorized under Section 8-503, a utility seeking eminent domain authority must show that eminent domain is “necessary for the construction” of such alterations, additions, extensions or improvements. Petitioners say in other words, the inquiry under Section 8-509 is two-part: a utility must receive a Section 8-503 order for construction of facilities and the utility must show that eminent domain is “necessary” for the construction.

Petitioners claim demonstrating that eminent domain is “necessary” requires evidence that a utility has negotiated in good faith with landowners, but that such negotiations will not be successful and so the necessary land rights can only be obtained by eminent domain. In Petitioners' view, the plain language of Section 8-509 therefore belies the conclusion that the issuance of a Section 8-503 order automatically equals a grant of eminent domain authority. (Petitioners Initial Brief at 11)

In granting eminent domain authority, Petitioners argue that the Commission traditionally has required a utility to make two showings: that a project continues to be necessary, and that, while the utility has conducted good-faith negotiations to acquire the necessary land rights, such negotiations have not been fruitful. (Petitioners Initial Brief at 12-13)

According to Petitioners, Staff's position appears to be that since Section 8-503 and 8-509 proceedings have been conducted simultaneously in some cases, a Section 8-509 proceeding should be conducted simultaneously with an 8-503 proceeding. In Petitioners' view, there is no legal or policy basis on which to conclude that proceedings must be filed under Sections 8-503 or 8-509 (or Section 8-406) concurrently. Petitioners claim these three statutory sections are separate, and address separate inquiries, and so Petitioners need not seek relief under these sections simultaneously. (Petitioners Initial Brief at 16-17)

Petitioners contend that they have met the standard for the grant of eminent domain authority discussed above. After numerous contacts with landowners, Petitioners claim they have made fair and reasonable offers of compensation. All along, Petitioners insist they have engaged in good-faith negotiations. Petitioners also note that none of the parties to this action have objected to Petitioners' request for eminent domain. (Petitioners Initial Brief at 18-19)

Regarding contacts with landowners, Petitioners state that prior to filing for a Certificate in Docket No. 06-0179, Petitioners say landowners along the Baldwin Rush and Prairie West Lines were invited to an informational workshop to view and discuss the proposed line route, the need for the transmission line, the proposed facilities and the area and alternatives considered by Petitioners in defining the proposed routes. Petitioners indicate that the workshop was for informational purposes only and no easement negotiations were permitted. (Petitioners Initial Brief at 19)

Next, Petitioners say landowners were sent a letter and "Statement of Information from the Illinois Commerce Commission Concerning Acquisition of Rights of Way by Illinois Utilities" at least 14 days prior to any contact by Petitioners' representatives for the purpose of seeking right of way, in compliance with the requirements of 83 Ill. Administrative Code Part 300. Petitioners indicate that no contact with these owners was initiated by Petitioners for at least 14 subsequent days. (Id. at 19-20)

After the 14-day notice period, Petitioners state that they contacted landowners along the Baldwin Rush and Prairie West Lines, in person if possible, and discussed the Project in full detail, informing them of the reason for the contacts and the purpose of the Project. Petitioners say that compensation was offered and the basis of that compensation explained. Petitioners state that they or their representatives were available for discussion and negotiations as required by each landowner. Petitioners indicate that each landowner on the Baldwin Rush and Prairie West Lines has been contacted at least 14 times, by letter, phone and in person. Petitioners insist their contacts with landowners have been extensive. (Petitioners Initial Brief at 20)

Petitioners state that their initial offer for the right-of-way easement right over each property was 75% of the appraised fee simple value of each parcel, with an extra 10% for the option to purchase the land in the future. In response to the concerns of the owners of the Unsigned Parcels, Petitioners indicate they hired third-party local appraisers to re-value those parcels, and then revised the offers of compensation. In those instances where the appraised property values were higher than the initial offers, Petitioners say they increased the easement compensation offers to reflect the amount of the appraiser's opinion of value for the easement acquisition. In those instances where the appraised property values were lower than the initial offers, Petitioners indicate they did not reduce its offers to reflect the lower values. Instead, Petitioners state that the offers were increased to reflect compensation levels being offered to other landowners. (Petitioners Initial Brief at 20-21)

Petitioners state that the offers of compensation that have been accepted by landowners are similar to the offers that have been rejected by the owners of the Unsigned Parcels. Given the numerous contacts with the landowners of the Unsigned Parcels, Petitioners do not believe that further negotiation will be fruitful. Therefore, Petitioners believe eminent domain is necessary to acquire the Unsigned Parcels. (Petitioners Initial Brief at 21)

Petitioners say they retained professional, experienced land agents, who met repeatedly with landowners. Petitioners contend their offers are reasonable, and in some cases well above the expected reduction in use-value of these properties post-Project. Petitioners indicate they retained local counsel to negotiate with landowners' counsel, and responded promptly to landowner requests regarding resurvey, access to the parcels and movement of poles, and landowners' counter-offers. Where requested, Petitioners say they revised the text of the easement to mitigate the landowners' concerns regarding the breadth of the right being granted. Petitioners believe they have conducted negotiations in good faith, and made reasonable attempts to gain the necessary easement rights. Petitioners insist they have therefore demonstrated that they should receive eminent domain authority pursuant to Section 8-509 of the Act. (Petitioners Initial Brief at 22)

According to Petitioners, a holdout is a seller who tries to extract some of the profit of the buyer through a high asking price. In many instances, Petitioners say a buyer could simply go elsewhere, but in circumstances where a defined area of land is required for a project, such as a network of parcels for an electric transmission line, gas pipeline, roadway, a holdout is a problem. Petitioners suggest a landowner realizes that he has the power to block a highly valued project and attempts to extract from that project all value above cost by exercising his locational monopoly. Petitioners assert that holdouts are landowners who individually or as a group refuse reasonable offers for easements and make extravagant monetary and other demands for the use of their property.

Petitioners claim that hold-outs can result in failure to complete a utility transmission route, increased expense, and crucially, power supply disruptions for customers. Petitioners contend that the solution to the holdout concern is eminent domain: where the holdouts are blocking a public necessity, eminent domain is exercised to give them the incentive to negotiate reasonably or, in the alternative, to have the value of the property interest set by a court of law. (Petitioners Initial Brief at 22-23)

Petitioners argue that certain landowners have been unresponsive, have made unreasonable demands regarding access to their property for surveys, and have in cases asked for disproportionately large sums of compensation, as high as three times the appraised value of their entire property. To avoid the disadvantages arising from such behavior, Petitioners believe the appropriate response is grant petitioners eminent domain over these parcels. Authorizing eminent domain, Petitioners contend, gives these landowners an incentive to bargain in good faith, because of the possibility that

the circuit court condemnation action may result in a lower award than the reasonable value being offered by Petitioners. (Petitioners Initial Brief at 23-24)

B. Staff's Position

Staff recommends that the Commission grant Section 8-509 authority to Ameren with respect to the outstanding parcels. However, Staff takes issue with Ameren on some aspects of the scope and purpose of the proceeding.

Staff maintains that Section 8-509 proceedings before the Commission, such as those filed by Petitioners, would have no purpose other than making effective the Commission's Section 8-503 Order in Docket No. 06-0179. Staff believes that the language in the applicable portion of Section 8-509 of the Act is quite clear: a proceeding to apply for eminent domain authority at the Commission would be limited to making a determination as to whether the Commission has entered an Order under Section 8-503 of the Act. Staff contends that a petition for Section 8-509 eminent domain authority would simply need to reference the prior Commission Order issued pursuant to Section 8-503 of the Act. (Staff Initial Brief at 4-5)

Staff believes Petitioners should have requested Section 8-509 authority along with their requests for Section 8-406 and 8-503 authority in Docket No. 06-0179. (Staff Initial Brief at 7) Staff also expresses concern about whether landowners can effectively participate in eminent domain cases if they are filed separately as Petitioners have done here. (Staff Initial Brief at 9-10; Reply Brief at 2)

According to Staff, the analysis under Section 8-406(b), where the Commission considers a number of factors, is the analysis which results in the approval of the route of the transmission lines. Staff states that Section 8-503, unlike Section 8-406(b), does not require the Commission to examine alternatives. Rather, Staff claims the focus of Section 8-503 is whether the project is of such importance and necessity so as to direct the utility to complete it, using eminent domain, if necessary. Staff states that issues regarding the route and need for the transmission lines were resolved in Docket No. 06-0179 and Staff does not believe such issues should be addressed in this proceeding. Staff urges the Commission not to use the testimony regarding transmission line route, design, schedule and need in the instant proceeding in an effort to re-determine the very issues that were examined and approved in Docket No. 06-0179. (Staff Initial Brief at 11-12)

Staff states that the crux of its argument throughout the consolidated proceeding has been that there is no requirement in the Act that the Commission must find that the utility has engaged in good faith negotiations with landowners before it can confer Section 8-509 authority. (Staff Initial Brief at 13)

Staff argues that should Ameren need to file an eminent domain proceeding in circuit court, the affected landowners would then have the opportunity to raise the issue of whether Ameren has conducted "good faith negotiations". Staff states that Ameren

will have the burden in circuit court of demonstrating that prior to filing its condemnation action, it has made good faith efforts to procure the property through negotiation. Staff is concerned is that if the Commission were to make a determination regarding “good faith negotiations”, the landowners may be estopped from raising issues they could otherwise raise in an eminent domain action in circuit court. (Staff Initial Brief at 13-14; Reply Brief at 3)

Staff states that there is no reference in the Act to the concept “reasonable attempts to acquire” the property. Staff says the requirement is found in the Statement of Information from the Illinois Commerce Commission Concerning Acquisition of Rights-of-Way by Illinois Utilities (“Statement”) in Appendix A of the “Guidelines for Right-of-Way Acquisitions”, 83 Ill. Adm. Code 300.10 et seq. According to Staff, the Statement provides clarification regarding a Section 8-503 proceeding – not a Section 8-509 proceeding. (Staff Initial Brief at 14)

Staff believes that it makes sense to consider, during the Section 8-503 proceeding, whether reasonable attempts have been made to acquire the land. (Staff Initial Brief at 15)

In its conclusions and recommendations, Staff recommends that the Commission grant Ameren Section 8-509 authority limited specifically to the parcels listed on Ameren Exhibits 4.0PW (Revised) at 2 and 4.0BR (Revised) at 2-3.

Staff also recommends that the Commission instruct Ameren and other future applicants for Certificates under Section 8-406 and for authority under Section 8-503 to make their requests simultaneously and to accompany their requests with requests for Section 8-509 eminent domain authority. Staff believes these instructions will clarify the procedure to all participants involved, reduce the possibility that landowners are not fully aware of the consequences of a Section 8-503 proceeding, and give landowners a full opportunity to participate in the process. Staff contends that its proposed approach is consistent with Sections 8-406, 8-503, and 8-509 and would facilitate the participation of landowners. (Staff Initial Brief at 17; Reply Brief at 1-3)

Staff believes that the participation of landowners is beneficial to both the Commission and landowners, as it will help to provide full and complete records so that the Commission can make informed decisions about line routes, and provides landowners an opportunity to participate in a process that may affect their property rights. In addition, Staff believes that addressing the sections simultaneously would encourage landowner participation, would allow landowners to provide input on all issues, and would be the more efficient use of landowners’ resources. (Staff Initial Brief at 17)

Staff also recommends that, as part of its review of Section 8-406/8-503/8-509 proceedings, the Commission determine whether the utility or common carrier has made reasonable attempts to acquire the property through negotiation. Staff asserts that this will encourage the utility or common carrier to commence early discussions

with landowners. Staff suggests that the Commission's determination about reasonable attempts should avoid the usage of the term "good faith negotiations". According to Staff, "good faith negotiations" is a distinct legal concept. Staff argues that nothing in the Act requires a determination about good faith negotiations, whereas the Eminent Domain Act requires good faith negotiations prior to the filing of a condemnation action in circuit court. Therefore, Staff recommends that any determination about good faith negotiations be left to the circuit court. (Staff Initial Brief at 17-18)

C. DMG's Position

Dynegy states that Petitioners originally included one parcel belonging to DMG in their request in Docket No. 08-0449. DMG's indicates that prior to Petitioners' filing of that docket, DMG and Petitioners had reached agreement with respect to one necessary easement but not with respect to the one included in Petitioners' filing. Subsequent to the filing of Docket No. 08-0449, DMG indicates that it and Petitioners executed an easement for the parcel at issue in that docket.

According to DMG, there is no need for eminent domain authority with respect to the land owned by DMG. Petitioners agree and are no longer seeking eminent domain authority with respect to the property owned by DMG. (DMG Initial Brief at 1-2, citing Ameren Ex. 4.0-BR (Revised) at 32-40) DMG believes the final Order for this case should reflect that Petitioners no longer need nor seek eminent domain authority with respect to the property owned by DMG.

VI. ORDERS IN DOCKET NOS. 06-0706 AND 07-0532

The Commission notes that it recently addressed many of the issues raised by Staff and Ameren in Docket No. 06-0706. The Commission's March 11, 2009 Order granted a certificate pursuant to Sections 8-406 and 8-503 of the Act.

In Docket No. 06-0706 the Commission found that a petitioner should not be required to seek relief under Sections 8-406, 8-503, and 8-509 simultaneously. The Commission stated that although situations may exist when doing so is appropriate, situations when it would not be practical are also imaginable. The Commission was not persuaded that utilities should be required to take the serious step of seeking to take property before they are even certain what route their facility will follow.

To assure that landowners are fully apprised of the potential impact to their land, regardless of which of the three sections of the Act relief is sought under, the Commission found that additional language should be used in future notices sent by the Chief Clerk pursuant to Section 200.150(h) of 83 Ill. Adm. Code 200, "Rules of Practice." The Commission indicated that while landowners currently receive sufficient notice, the added language would provide landowners with additional information and thereby address at least some of Staff's concerns. The Commission emphasized that it welcomes and appreciates the input of landowners.

In another recent Ameren transmission line proceeding, Docket 07-0532, the Commission concluded, in part, on pages 13-14 of its Order of May 6, 2009:

Furthermore, this Commission does not agree with Staff's argument that issuing an order pursuant to 8-503 in essence guarantees eminent domain against landowners and further rejects Staff's argument that in a later 8-509 proceeding the utility company need only reference the prior Commission order under Section 8-503 to receive eminent domain. To the contrary, the Commission believes that an 8-503 order does not conclusively render a later 8-509 proceeding a mere formality in obtaining eminent domain against property owners. First, nowhere under Section 8-503 does it contain language as to eminent domain and therefore, should not be inferred to include such language. Second, AmerenCIPS has not requested or made a showing for eminent domain authority. Furthermore, if it were AmerenCIPS intent to receive eminent domain, it must make this request under Section 8-509. At which time, AmerenCIPS must establish that proper negotiations have been made with landowners in addition to satisfying this Commission that the construction of facilities is necessary. To emphasize the above, this Order does not constitute a grant of eminent domain authority. This conclusion is consistent with the Commission's recent order in Docket No. 06-0706.

VII. COMMISSION ANALYSIS AND CONCLUSIONS

By way of background, it is noted that the Commission entered an Order in Docket 06-0179 on May 16, 2007, granting a Certificate of Public Convenience and Necessity to AmerenIP and Ameren Illinois Transmission Company pursuant to Section 8-406 of the Public Utilities Act. The Certificate authorized the construction and operation of three 345 kV electric transmission lines, totaling approximately 38 miles in length, over the routes approved therein. There were numerous intervenors in the case, many of whom were landowners over whose property the transmission lines would extend.

The lines will be used to interconnect Ameren's high voltage transmission system with a 1,650 megawatt coal-fired generating station, known as the Prairie State Facility, being constructed near Marissa in Washington County.

As stated in the Order in 06-0179, Petitioners also requested that the Commission "authorize construction of the Project pursuant to Section 8-503 of the Act." Section 8-503 provides, in part:

Whenever the Commission ... shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility ... are necessary and ought reasonably to be made or that a new structure or structures is or are necessary and should be erected, to promote the

security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the Commission shall make and serve an order authorizing or directing that such additions, extensions, repairs, improvements or changes be made, or such structure or structures be erected....

In the findings and ordering paragraphs, the Order in 06-0179 authorized Ameren “to construct the Project pursuant to Section 8-503 of the Act.”

In 06-0179, Staff recommended that the order also grant eminent domain-related relief pursuant to Section 8-503, by specifically finding that the order “will in effect authorize Petitioners to enter upon, take, or damage private property, in the manner provided for by the law of eminent domain” (06-0179, Exc. at 9) However, Petitioners opposed such a finding, observing that it would be premature. They noted that eminent domain authority was not being sought in 06-0179 because negotiations with landowners were ongoing. (06-0179, RBOE at 5-6) Petitioners stated that if they were to subsequently determine there was a need to condemn certain parcels of property in order to construct the Project, they would seek Commission approval to exercise eminent domain authority in a separate proceeding.

Accordingly, in 06-0179, the Order did not make findings as to whether Petitioners had engaged in diligent, good faith negotiation efforts with landowners or had made reasonable attempts to acquire the necessary land rights through negotiations with landowners. Similarly, the Order did not adopt the finding, proposed by Staff, that the order “will in effect authorize Petitioners to enter upon, take, or damage private property, in the manner provided for by the law of eminent domain” Instead, the Order found that if Petitioners later determined there is a need to seek eminent domain, they will need to obtain Commission authorization before doing so. (Order at 40)

Similar findings were made in the Commission’s recent 8-406/8-503 Order in another Ameren electric transmission line case, 06-0706, entered March 11, 2009. There the Commission observed, on page 88, that “[p]etitions filed under Sections 8-406 and, particularly, 8-503 do not contain some implicit request for eminent domain authority and should not be read as such”, and that “[a]ny petitioner seeking eminent domain authority must specifically request such relief under Section 8-509 in its petition.”

The Commission also made similar findings in its Order of May 6, 2009 in another Ameren transmission line proceeding, Docket 07-0532.

Subsequent to the entry of the Order in 06-0179, Ameren continued to pursue its negotiation efforts with landowners. Eventually, easements for many, but not all, of the tracts along the approved routes were obtained through the negotiation process.

Therefore, in the **instant dockets**, 08-0291 and 08-0449, Ameren filed a petition pursuant to Section 8-509 of the Act for an order approving the use of eminent domain with respect to the parcels, on two of the lines certificated in 06-0179, for which Ameren had been unable to obtain easement rights through the negotiation process. Section 8-509 provides, in part:

When necessary for the construction of any alterations, additions, extensions or improvements ordered or authorized under Section 8-503 or 12-218 of this Act, any public utility may enter upon, take or damage private property in the manner provided for by the law of eminent domain.

In its petitions in 08-0291 and 08-0449, Ameren alleges that it has attempted to obtain the remaining easements through diligent good-faith negotiation efforts, but has been unsuccessful in doing so. In support of its petition, Ameren filed testimony describing such efforts; Ameren also filed testimony regarding the route, design and schedule of the line. This testimony was offered in support of its assertion that eminent domain relief is necessary within the meaning of Section 8-509. Staff's motion to strike such evidence as irrelevant was denied, and the ruling was upheld by the Commission on review.

In filings made in 08-0291 and 08-0449, the Commission Staff "recommend[s] that the Commission grant Petitioners eminent domain authority for the . . . line." (Affidavit at 2; Staff brief at 17) Staff recommends that such authorization be limited specifically to the parcels listed on Ameren Exhibits 4.0PW (Revised), p. 2 and 4.0BR (Revised), pp. 2-3.

Staff also recommends that the Commission require Ameren and other future applicants seeking Certificates under Section 8-406 and authority under Section 8-503 "to make their requests simultaneously and to accompany their requests with requests for Section 8-509 eminent domain authority." (Staff brief at 17)

Staff made the same request in Docket 06-0706, proposing that petitioners be required to seek relief under all three Sections, 8-406, 8-503 and 8-509, simultaneously. Ameren opposed the recommendation; Ameren observed, among other things, that it did not seek eminent domain relief in its Section 8-406/8-503 petitions, and that filing an 8-509 petition later rather than simultaneously allowed it to conduct additional negotiations with landowners before seeking eminent domain relief under 8-509.

In its Order in 06-0706, entered March 11, 2009, the Commission rejected Staff's proposal that petitioners be required to seek relief under Sections 8-406, 8-503, and 8-509 simultaneously. There, the Commission expressly found that "a petitioner need not seek relief under Sections 8-406, 8-503, and 8-509 simultaneously." In rejecting Staff's proposal in 06-0706 to require petitioners to seek relief under 8-406, 8-503, and 8-509 simultaneously, the Commission found, among other things, that holding an 8-509 proceeding after land negotiations may better serve landowners.

In the instant case, the Commission again finds, just as it did on March 11, 2009 in 06-0706, that petitioners should not be required to seek relief under Sections 8-406, 8-503, and 8-509 in the same docket. Although a simultaneous approach may be appropriate in some instances, the Commission believes a sequential approach can be of benefit to landowners because of the additional negotiation opportunities afforded to them.

With regard to Staff's concerns regarding meaningful notice to landowners in future cases, the Commission notes that in 06-0706, the Commission found that additional language should be used in future notices to landowners sent by the Chief Clerk pursuant to Section 200.150(h) of 83 Ill. Adm. Code 200. Such language is intended to assure that landowners are fully apprised of the potential impact to their land, regardless of which of the three sections of the Act relief is sought under. In the instant case, the Commission again observes that the added language required by the Order in 06-0706 will provide landowners with additional information, thereby addressing some of Staff's concerns.

Regarding whether the Petitioners in the instant cases have made reasonable attempts to acquire the outstanding easement rights through the negotiation process, the record indicates that Petitioners have done so and that despite such efforts, Petitioners have been unable to obtain the remaining easements. As the Commission indicated on page 14 of in its Order of May 6, 2009 in Docket 07-0532, "[I]f it were AmerenCIPS' intent to receive eminent domain, it must make this request under Section 8-509..., [a]t which time, AmerenCIPS must establish that proper negotiations have been made with landowners"

In conclusion, the Commission finds that the easement rights sought by Petitioners are necessary for the construction of the lines previously authorized under Sections 8-406 and 8-503, and that relief pursuant to Section 8-509 should be granted, thereby allowing Petitioners to seek eminent domain in court. As recommended by Staff, the relief granted herein is limited specifically to the parcels listed on Ameren Exhibits 4.0-PW (Revised) at 2 and 4.0BR (Revised) at 2-3. Additionally, the Commission finds that Petitioners no longer need nor seek eminent domain authority with respect to the property owned by Dynegy; therefore, the relief granted herein does not include the property owned by Dynegy.

VIII. FINDINGS AND ORDERING PARAGRAPHS

The Commission having examined the entire record herein, is of the opinion and finds that:

- (1) AmerenIP is an Illinois corporation engaged in the business of furnishing electric service in the State of Illinois and is a public utility within the meaning of Section 3-105 of the Act;

- (2) AITC is an Illinois corporation and a public utility within the meaning of Section 3-105 of the Act that will fund, construct and operate the Project in conjunction with AmerenIP;
- (3) the Commission has jurisdiction over the parties and the subject matter of this proceeding;
- (4) the facts recited and conclusions reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings herein;
- (5) within the meaning of and pursuant to Section 8-509 of the Act, authorization to use eminent domain to acquire all necessary easement rights, including construction easements, across the Unsigned Parcels identified in Ameren Exhibits 4.0-PW (Rev.) at 2 and 4.0-BR (Rev.) at 2-3 is necessary for the construction of the Prairie West Line and Baldwin Rush Line, is necessary and should be granted; the easements shall be of such width as is reasonably necessary for said construction, not to exceed 150 feet.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that Illinois Power Company d/b/a AmerenIP and Ameren Illinois Transmission Company are hereby granted authority to exercise eminent domain, in the manner provided for by the law of eminent domain, to acquire the easement rights described in Finding (5) above.

IT IS FURTHER ORDERED that all petitions for leave to intervene are granted.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Act and 83 Illinois Administrative Code 200.880, this Order is final and is not subject to the Administrative Review Law.

By proposed order of the Administrative Law Judge this 8th day of May, 2009.

Administrative Law Judge